slightly different way is in harmony. *Dalrymple* v. *Scott*, 19 Ont. App. 477.

A doctrine resulting in such decisions as these is objectionable. The principle of fairness, introduced under the terms of implied conditions, excusing one party from performance on the *actual* failure of the counter-performance, applies with equal force when it appears that there is *going to be* such failure. *Ripley* v. *M'Clure*, 4 Exch. 345; *Lowe* v. *Harwood*, 139 Mass. 133. There is also the well-recognized rule that forbids a plaintiff increasing the damages by a useless performance after the defendant has expressed his intention not to carry out the contract. *Clark* v. *Marsiglia*, 1 Denio, 317; *Chicago, etc., Co.* v. *Barry*, 52 S. W. Rep. 451 (Tenn.). These considerations of fairness are not only in evident conflict with the doctrine of the principal case, but they are in accord with the commercial understanding. Where one party repudiates the contract, no course is more natural than for the other to remain passive, either hoping for a future fulfilment of the agreement, or looking for an opportunity to contract elsewhere. This passivity ought not to render the repudiation, if it still continues, inoperative as a defence. Such a course is also advantageous to the one who repudiates, as he may retract his repudiation, unless it has been acted upon. *Nilson* v. *Morse*, 52 Wis. 240. A further difficulty is that courts leave us quite in the dark as to what act, if any, other than immediately bringing suit, will be sufficient to render the repudiation operative. It would seem wise, therefore, not to extend the doctrine of anticipatory breach beyond its first proposition, the immediate right to sue. If the injured party elects not to sue at once, the ordinary rules of contract should govern, and the repudiation should be an excuse for his subsequent non-performance. It is therefore unfortunate that Lord Cockburn's suggestion of compelling the defendant to sue at once or to continue to perform should have been recently strengthened by an actual decision.

VALIDITY OF SPECIAL ASSESSMENTS UNDER THE FOURTEENTH AMENDMENT. — It was thought by many that a deathblow had been dealt to the "front foot rule" by the Supreme Court in the important case of *Norwood* v. *Baker*, 172 U. S. 269. The court asserted that the exaction of an assessment in substantial excess of the special benefits was, to the extent of such excess, a taking of property without compensation, and was supposed to have decided in consequence, that a rule of apportionment which does not provide for an inquiry into special benefits is in violation of the Fourteenth Amendment. This interpretation of the decision is vigorously maintained by Mr. Justice Harlan in the dissenting opinion of a subsequent case. The majority of the court, however, while professing not to overrule *Norwood* v. *Baker*, seem to justify it on its peculiar facts, and in upholding the validity of the "front foot rule" to repudiate its supposed doctrine. *French* v. *Barber, etc., Co.*, 181 U. S. 324. A recent case is interesting as recognizing that this modification leaves little of the doctrine. *Zehnder* v. *Barber, etc., Co.*, 108 Fed. Rep. 570 (Cir. Ct. Ky.). In this case, a temporary injunction, which had been granted on the authority of *Norwood* v. *Baker*, was dissolved in conformity with *French* v. *Barber, etc., Co.*

An historic clause like the Fourteenth Amendment should be con-

strued in the light of the law existing at the time of its adoption. *Murray's Lessee* v. *Hoboken, etc., Co.*, 18 How. 272; *Mattox* v. *U. S.* 156 U. S. 237. Construed thus, "due process of law" seems to mean the same as "the law of the land" in Magna Charta, and to have no reference to taxation. It was intended to secure ancient guaranties, not to establish new ones. The safeguard against unjust taxation was supposed to be the representative system. It is probably true as a matter of the theory of taxation that the basis of special assessments is special benefit. 2 Dillon, Mun. Cor., 4 ed., § 761. But the taxing power is a legislative power, and belongs to the state legislatures except as to objects forbidden by the Constitution. Included in the taxing power is the power of apportionment. It is for the legislature to weigh the benefits and burdens and the other considerations which enter into any plan of apportionment. *People* v. *Brooklyn*, 4 N. Y. 419. Consequently, so long as there is what can be called a real exercise of the taxing power the Fourteenth Amendment is not violated. It is only where it is a mere pretence and subterfuge that there can be said to be any ground for the interference of the Supreme Court. The Fourteenth Amendment has no applicability to the expediency or justice of the tax, nor to the question of its equality. *Kelly* v. *Pittsburgh*, 104 U. S. 78. Equality is sometimes a requisite under state constitutions, but the United States Constitution has no such requirement in regard to state taxation, and cases dealing with this phase of the question are to be carefully distinguished. See *Chicago* v. *Larned*, 34 Ill. 203. It is to be noticed also that, unless some adequate distinction be drawn between special assessments and general *ad valorem* taxation, the latter would seem to be covered by the proposition in *Norwood* v. *Baker*, *supra*, which obviously could not have been intended. If by "special assessment" be meant a tax on less than a political subdivision, the states by exercising their undoubted power of changing their political subdivisions could convert a special assessment into a general tax. 14 HARVARD LAW REVIEW, 1, 98. The court in *Norwood* v. *Baker* seems to have proceeded upon a too narrow view of the Constitution. The decision in *French* v. *Barber, etc., Co.*, *supra*, approved in the principal case is not only sounder in principle, but seems to be supported by the current of decision in the Supreme Court prior to *Norwood* v. *Baker*. *Davidson* v. *New Orleans*, 96 U. S. 97; *Spencer* v. *Merchant*, 125 U. S. 345; *Walston* v. *Nevin*, 128 U. S. 578. Moreover the result seems eminently desirable in view of the prevalence and long standing of the "front foot rule," and further agitation of the question can only result in confusion and practical difficulties.

THE ADMISSIBILITY OF TESTIMONY GIVEN BEFORE A GRAND JURY. — A witness makes self-criminating statements before a grand jury, although warned of his privilege. Subsequently he is accused and brought to trial. The question whether or not his previous testimony can be admitted is raised in a recent Texas case, the court holding such testimony admissible. *Wisdom* v. *State*, 61 S. W. Rep. 926 (Tex. Cr. App.). The decision is based entirely upon the ground that a grand juror is competent to testify to such statements, since he does not thereby violate the secrets of the jury room. This proposition, though apparently well settled, is not conclusive on the question in issue. *Commonwealth* v. *Mead*, 12 Gray, 167.